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FEDERAL ENERGY
REGULATORY COMMISSION

UNITED STATES OF AMERICA
BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator)
Corporation)

Docket Nos. ER12-897-000

**REQUEST FOR LEAVE TO ANSWER AND ANSWER OF CALPINE CORPORATION
TO PROTESTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION'S PETITION FOR WAIVER OF TARIFF PROVISIONS**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,¹ Calpine Corporation ("Calpine"), the indirect owner of the Sutter Energy Facility ("Sutter"), hereby requests leave to answer and submits this answer to the protests filed in opposition to the California Independent System Operator Corporation's ("CAISO") January 25, 2012 petition for waiver of tariff provisions in this proceeding.² Calpine supports the CAISO's petition for waiver, which, if granted, would enable CPM designation of the Sutter Energy Center ("Sutter"), which is a unit at risk of retirement, under the terms of CAISO Tariff section 43.2.6.

REQUEST FOR LEAVE TO ANSWER

While the Commission's Rules of Practice and Procedure do not generally provide for answers to protests, the Commission will accept such answers when they assist it in clarifying the record and provide additional information that will assist the Commission in resolving

¹ 18 C.F.R. § 385.213 (2011). Calpine has previously filed, pursuant to Rule 214, a doc-less motion to intervene out of time in this proceeding.

² Petition for Waiver of Tariff Revisions and Request for Confidential Treatment, Docket No. ER12-897-000 (Jan. 25, 2012) ("Petition for Waiver").

issues.³ This answer addresses factual issues erroneously raised in the protests and will, therefore, assist the Commission in deciding the issues before it. Accordingly, the Commission should accept this answer.

ANSWER

Many protests inappropriately question Calpine's *bona fides* in attesting that "the decision to retire Sutter is definite unless CPM procurement occurs," and that "it will be uneconomic for the resource to remain in service in [2012]."⁴ Calpine exercised its sound business judgment in making these determinations and, in support of its attestations, provided to the CAISO all of the financial information and documentation required under Tariff section 43.2.6(5). The CAISO has not petitioned for waiver of these Tariff requirements, which it has determined that Calpine has fully met.⁵ Accordingly, the protests largely and inappropriately question Calpine's business judgment and its qualification for CPM designation under Tariff provisions that are not the subject of this proceeding.⁶

Calpine has not made the consequential decision to retire Sutter lightly. Calpine's business is developing and operating power plants and it has participated actively in the

³ See, e.g., *Duke Energy Oakland, LLC*, 102 FERC ¶ 61,093, at P 10 (2003) (accepting answer to protest because it assisted the Commission in understanding and resolving the issues); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211, at 61,672, at n.5 (1990) (confirming the Commission's discretion to permit an answer to a protest when the answer facilitates the decisional process or aids in explaining issues); *Pacific Gas and Electric Co.*, 107 FERC ¶ 61,038, at P 8 (2004); (accepting answers to protests and answers because "they have provided information that assisted us in our decisionmaking"); *Morgan Stanley Capital Group, Inc. v. New York Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000) (accepting answer to answer because it helped to develop the record in the proceeding).

⁴ CAISO Tariff, § 43.2.6(5).

⁵ See Petition for Waiver at 33 ("Calpine has provided an affidavit and supporting financial information and documentation that meet the tariff requirements."). If the requested waiver is granted, Sutter will be eligible for CPM designation.

⁶ Indeed, the CAISO's determination that Sutter meets the requirements of Tariff section 43.2.6(5) is self executing under the Tariff, and does not require a filing with or approval by the Commission.

California markets since their inception. Calpine is mindful of the economic consequences to its employees and to the local communities of its decision to retire Sutter. However, Calpine has decided, in the exercise of its business judgment, to shut down the modern Sutter electric generating facility in 2012 for economic reasons. That definite decision and the basis for it should not be questioned nor doubted in this proceeding, which is properly limited to the CAISO's requested waiver to address the single Tariff requirement relating to the time period in which CAISO's reliability need for Sutter will arise.⁷

1. Calpine's definite decision to retire Sutter in 2012, absent CPM designation or comparable bilateral capacity procurement, is *bona fide*.

CAISO Tariff section 43.2.6 required that an executive officer with authority to bind Sutter submit an affidavit attesting, under penalty of perjury, that it will be uneconomic for Sutter to remain in service in 2012 and the company's decision to retire Sutter is definite unless CPM procurement occurs. The Tariff and implementing Business Practice Manual also required Calpine to submit supporting financial information and documentation to the CAISO, which is also subject to review by the CAISO's Department of Market Monitoring. Calpine submitted the requisite affidavit and supporting financial information and documentation. The CAISO has confirmed in its Petition for Waiver that Calpine met these Tariff requirements.⁸ The CAISO's Department of Market Monitoring is reviewing Calpine's supporting financial information and documentation. The Department of Market Monitoring requested significant discovery of the supporting analysis, assumptions and input data that supports Calpine's representations. They have indicated satisfaction with all responses and did not indicate in any manner that the financial information and documentation that Calpine has provided to be insufficient, erroneous

⁷ See CAISO Tariff, § 43.2.6(3).

⁸ Petition for Waiver at 33.

or misleading. We are unaware of any action or intention by the Department of Market Monitoring to refer any matters arising from its review of the Sutter financial information to the Commission's Office of Enforcement. Regardless of further action or inaction by the DMM, with the safeguard of this DMM review, the Commission's order approving Tariff section 43.2.6 found that "the affidavit should be sufficient to establish that a resource cannot continue to operate economically."⁹

Notwithstanding Calpine's satisfaction of the Tariff requirements to submit an affidavit and supporting financial information and documentation, some parties question the sufficiency of Calpine's "thin economic analysis" and "activities [that] appear inconsistent with a supposedly definite decision to retire the Sutter Plant."¹⁰ Calpine reiterates that it has provided the requisite affidavit and financial information and documentation. Calpine stands behind its exercise of business judgment, its detailed financial analyses, and its consideration of an extensive array of factors and considerations, all of which led to the company's definite decision to retire Sutter in 2012 if it does not receive a CPM designation or comparable bilateral capacity procurement.¹¹ Neither the Tariff nor the CAISO's limited request for waiver provide a basis for second guessing Calpine's exercise of its business judgment, the CAISO's acceptance of Calpine's financial information, or the attestations that it will be uneconomic for Sutter to remain in service in 2012 and that the company's decision to retire Sutter is definite, unless CPM procurement or comparable bilateral capacity procurement occurs.

⁹ *Calif. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211 at P 132 (2011) ("CPM Order").

¹⁰ Protest on Behalf of the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, Docket No. ER12-897-000 at 13 (Feb. 16, 2012) ("Six Cities Protest"); *See also* Joint Protest of the California Municipal Utilities Association and the Utility Reform Network, Docket No. ER12-897-000 at 21-22 (Feb. 16, 2012) ("CMUA/TURN Protest").

¹¹ *See* Supplemental Affidavit of Alex Makler, Petition for Waiver, Attachment C at 19-20 ("Supplemental Affidavit").

Some parties have suggested that Sutter's definite retirement decision is contradicted by its other on-going regulatory and business activities. The supposedly contradictory activities include Sutter's pursuit of a previously filed interconnection request for a direct interconnection to the CAISO to replace the current pseudo tie arrangement, and the approval by the California Energy Commission ("CEC") of an amendment to Sutter's construction permit to enable Calpine to construct gathering facilities for access to natural gas supplies.¹² Contrary to implications in the protests, Calpine pursued these activities for *bona fide* business reasons, which are not contradicted by its separate business decision to retire Sutter if it does not obtain CPM designation or comparable bilateral capacity procurement in 2012.

First, Sutter began consideration of alternatives to its current interconnection four years ago. These alternatives potentially provide valuable options to the current interconnection which burdens Sutter with significant incremental transmission expense. It is Calpine's business judgment that it is prudent to consider and to pursue any and all options up to the point at which retirement occurs. If Sutter receives a CPM designation or comparable capacity procurement in 2012, with the proposed alternative interconnection, it will be positioned in the future to be a more economic asset.

Second, Calpine sought and obtained CEC approval of an amendment to Sutter's construction permit in order to construct new gathering facilities to obtain access to natural gas supplies that can be shipped on Calpine's proprietary pipeline, which serves not only Sutter but other Calpine natural-gas fired plants in California. The fact that an amendment of Sutter's CEC permit was required to obtain authorization for new gathering facilities that would serve a number of other Calpine plants, is a function of filing requirements associated with Sutter's CEC

¹² See e.g., Six Cities Protest at 13-14; Motion to Intervene and Protest of the Northern California Power Agency, Docket No. ER12-897-000 at 8 (Feb. 16, 2012).

permit, which covered the geographic segment of the Calpine proprietary pipeline to which the new gas gathering facilities would be connected. That the permit amendment was sought in Sutter's name should not obscure the business function of the authorized gathering facilities, and their utility to a number of Calpine plants, in addition to Sutter, that are served by the Calpine proprietary pipeline.

Another party questions whether Sutter is responsible for its own financial situation, as a result of "unsuccessful bargaining strategies and/or an inability to compete in the market."¹³ Such supposition is dispelled by Calpine's successful track record of developing, owning and operating more than a dozen natural gas generating facilities active in the CAISO market. Calpine's lack of a resource adequacy ("RA") contract for 2012 or other comparable capacity procurement occurred despite the company having undertaken significant efforts to market Sutter's capacity. Those efforts included bidding into multiple resource solicitations held by Pacific Gas and Electric Company, seeking contracts from a host of ESPs, holding a "reverse" request for offers for Sutter's capacity, and entering into bilateral negotiations with parties. Those efforts yielded bilateral RA contracts with more than 10 counterparties in each of the years 2008-2011. However, those efforts were unsuccessful in obtaining offers for sufficient RA contract revenues to ensure continued economic operations in 2012. Consistent with its previous efforts to secure a contract for Sutter's capacity, Calpine is planning to participate in PG&E's recently issued RFO and to submit a bid that reflects the costs to support Sutter's going forward operations.

Thus, the Commission should not credit suppositions that Sutter is somehow responsible for its financial plight. Many parties, of diverse perspective, have acknowledged that there are

¹³ See Motion to Intervene and Protest of San Diego Gas & Electric Company, Docket No. ER12-897-000 at 12 n.27 (Feb. 16, 2012) ("SDG&E Protest").

fundamental problems with the California regulatory construct that create pressures for generators that are unable to secure bilateral RA contracts.¹⁴

2. This proceeding arises from Calpine's business decision to retire Sutter; parties' claims that "mothballing" should be considered as an alternative are outside the purview of Tariff section 43.2.6 and, therefore, should be rejected.

A number of parties assert that the CAISO has uncritically accepted Calpine's representations regarding the legal impediments and economic infeasibility of mothballing Sutter for a period of years until it might be needed by the CAISO for reliability reasons.¹⁵

"Mothballing" is not a defined term in the CAISO tariff nor is it an alternative required to be considered under the CPM Order authorizing the CAISO's risk-of-retirement designation. There are no tariff provisions defining or establishing compensation for "mothballing." Calpine has not sought a "mothballing" payment. Rather, Calpine seeks CPM compensation for Sutter to avoid its retirement in 2012, to cover its going forward costs, and to ensure that it is available to the CAISO for operation under Tariff section 43.2.6.

Protesters variously describe "mothballing" or they use the term loosely, and none addresses regulatory (FERC, CPUC, CEC or EPA) authorities, conditions or regulations supporting or limiting "mothballing." No party has explained how "mothballing" for an indefinite duration would create a safe harbor for Sutter from future and stricter air permitting requirements or insulate Sutter from lengthy and uncertain litigation over environmental

¹⁴ See e.g., Motion to Intervene and Protest of the NRG Companies and the Dynegy Companies, Docket No. ER12-897-000 at 10-14 (Feb. 16, 2012); Southern California Edison Company's Motion to Intervene and Protest on the California Independent System Operator's Petition for Waiver of Tariff Provisions, Docket No. ER12-897-000 at 12 (Feb. 16, 2012) ("SCE Protest") ("SCE regards the dilemma that Calpine's notice of retirement has created for the CAISO as stemming directly from the absence of a forward capacity market in California."). Calpine also believes that fundamental market reforms are needed, but that the scope of those reforms need not be addressed in this proceeding.

¹⁵ See e.g., SCE Protest at 8-9; Six Cities Protest at 14; CMUA/TURN Protest at 23.

requirements attendant to a return to operations. Ill-defined proposals that lack regulatory, legal and operational foundation and that are put forward as putative alternatives to retirement should be rejected as beyond the scope of this waiver proceeding, which is limited to units at risk of retirement that have made the definite and economically supported decision to retire.

As explained in Calpine's request for CPM designation of Sutter, Calpine considered environmental risks attendant to its retirement decision. Calpine has extensive experience in evaluating environmental risks, which are encountered with every power plant permitted in California. No party can seriously contend that the permitting environment in California is not challenging, that the risk of legal action is not real or that Calpine's business judgment of risk is not based in significant experience.

Thus, in considering the implications of the retirement of Sutter, Calpine reached its business judgment, informed by its extensive environmental permitting experience, legal advice and business considerations. In the exercise of its business judgment, Calpine determined that there would be substantial environmental, investment, and litigation risks associated with a power plant that retires or otherwise shuts down with no definitive plan to restart in the foreseeable future, precluding any "practical assurance that Sutter and its flexible operating characteristics would again be permitted and available in future years [after retirement]."¹⁶ Calpine does not believe the legal foundation of environmental risks and the assessment of such risks by Calpine in the exercise of its business judgment are within the scope of the limited waiver request made by the CAISO.

¹⁶ Calpine Request for CPM Designation of Sutter, Petition for Waiver, Attachment A at 6. The identified risks include the risks of being required to undergo New Source Review prior to reactivation in a later year, to meet then-current BACT requirements and otherwise satisfy all new air permitting requirements that have gone into effect since Sutter was first permitted, and endure a lengthy, highly contentious and uncertain appeals process. *Id.* Calpine concluded that, in its business judgment, an indefinite shutdown, or "mothballing" of Sutter with no definitive plan to restart in the foreseeable future would also be subject to these same risks and uncertainties. *Id.*

Finally, SDG&E suggests that, if Calpine is correct that the environmental risks make Sutter's return to operation uneconomic or infeasible, the company should "simply abandon its ownership of this albatross and divest it to new owners."¹⁷ This is a totally fanciful notion, divorced from economic reality. Calpine has no reason to believe that Sutter would attract buyers given the resource's current economic predicament, nor has any such buyer appeared. SDG&E's suggestion about divestiture should not be credited in this proceeding. And parties' suggestions that there are alternatives to retirement or to CPM designation should likewise be rejected in this proceeding.

3. Were the Commission to grant the requested waiver, but set compensation for a hearing, subject to refund, it would seriously complicate whether Sutter would be available to the CAISO on or about July 1, 2012

A number of protests suggest that Sutter's costs and other matters should be set for hearing,¹⁸ even though Calpine has met the requirements for CPM designation under Tariff section 43.2.6, but for the limited issue of the time period in which CAISO's reliability need for Sutter will arise. Any action by the Commission to set compensation or other matters for hearing, even while allowing the CPM rate to be applied, subject to refund, would create substantial uncertainty for Calpine as to whether Sutter would ultimately obtain sufficient revenues to cover its going forward cost of operations. The absence of such cost recovery is, of course, the reason that Calpine reached its decision to retire Sutter, absent CPM procurement or comparable bilateral capacity procurement. Accordingly, any procedural outcomes that do not provide Calpine sufficient assurance of CPM designation and compensation (or comparable

¹⁷ SDG&E Protest at 12.

¹⁸ See e.g. CMUA/Turn Protest at 6; Six Cities Protest at 16; Motion to Intervene and Comments of the California Department of Water Resources State Water Project, Docket No. ER12-897-000 at 15-16 (Feb. 16, 2012).

bilateral capacity procurement), sufficiently prior to July 1, 2012, as required to procure, schedule, and perform maintenance,¹⁹ might result in circumstances in which Sutter would be retired and not be available to the CAISO for the balance of 2012.

CONCLUSION

In conclusion, Calpine requests leave to submit this Answer, which clarifies the record and corrects certain suppositions and misplaced arguments in various protests regarding the *bona fides* of Calpine's business decisions and attestations that support Sutter's qualification for CPM designation as a unit at risk of retirement in 2012. Calpine also requests that the Commission grant the waiver requested by the CAISO, which would enable Sutter to receive CPM designation and compensation (or comparable bilateral capacity procurement) under Tariff section 43.2.6 on or about July 1, 2012.

¹⁹ See Supplemental Affidavit at P 21; Petition for Waiver at 42-43.

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Certificate of Service

I hereby certify that I have served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 24th day of February, 2012.

/s/ Mark L. Perlis
Mark L. Perlis